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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re M.A., et al., Persons Coming Under
the Juvenile Court Law.

B215613
(Los Angeles County
Super. Ct. No. J969655)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

RONALD A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Marilyn Mordetsky, Juvenile Court Referee, Marguerite D. Downing, Judge. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

* * * * *

Appellant Ronald A. (father) appeals from the juvenile dependency court's denial of his two petitions for modification made pursuant to Welfare and Institutions Code section 388.¹ Father contends the juvenile court denied him due process by refusing to allow him to present live testimony and certain documentary evidence in support of his petitions. We find no denial of due process and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Father has at least six children, three of whom are the subjects of this appeal—daughter M.A. (age 17), and sons J.A. (age 15) and R.A. (age 14). Three of father's older daughters (P.A., Jal.A. and A.A.) were dependents of the juvenile court but are now adults. In November 1999, after father had been released from jail on a child molestation charge, respondent Los Angeles County Department of Children and Family Services (the department) filed a section 300 petition alleging numerous counts against father and the children's mother, who is not a party to this appeal. As sustained in February 2000, the section 300 petition alleged, among other things, that father physically and emotionally abused the children and engaged in domestic violence; sexually abused P.A., Jal.A. and M.A. and their siblings; had a history of substance abuse, including cocaine; and a criminal history of convictions for inflicting corporal punishment on a spouse, burglary and possession for sale of narcotics. The children were placed with the S. foster family in December 1999 and declared dependents of the juvenile court. Father was denied reunification services and contact with the children. Father appealed this disposition order, along with the disposition order in a separate case involving father's alleged sexual abuse of A.A. The appeals were consolidated and we affirmed the juvenile court's disposition orders in both cases (*In re Ashley A.* (Nov. 27, 2001, B142952 [nonpub. opn.]).

¹ All statutory references are to the Welfare and Institutions Code unless otherwise noted.

The statements of oral copulation and vaginal and anal intercourse made by the children were consistent with molestation incidents described by them to the police and other social workers. During the first 18 months following disposition, the children had no contact with father and consistently expressed their objection to having visits or telephone contact with him. In February 2001, the children's therapist stated that none of the children had recanted any of the charges of sexual abuse by father. A year later, father was allowed to have monitored telephone calls with those children who were willing to talk to him, but these were short lived, as the children were uncomfortable with the calls, and the court ordered no contact between father and the children, including telephone calls.

In June 2002, the children had a conjoint therapy session with father, and unanimously stated that they did not enjoy the session and did not want to repeat it. The following month, the juvenile court allowed father to have visits with the children in a therapeutic setting, but no telephone contact. No contact between father and the children was reported for three years until the department's July 2005 report. The department reported that during the preceding six months father had been having monthly visits with M.A., J.A. and R.A. at the department's offices. The social worker monitored two of the visits and observed no closeness between father and the children. The visits nevertheless continued. During one visit in May 2006, father began questioning R.A. about his statements contained in a report and became so forceful that R.A. began crying. When the children's foster mother tried to stop the visit, father began yelling and cursing at her. Thereafter, R.A. no longer wanted visits with father.

In June 2007, the department reported that father had not visited the children for nearly a year. Father then visited the children in December 2007, March and May 2008. A visit scheduled for July 2008 was cancelled when the children refused to attend. Father has not had any further contact with J.A. or R.A. M.A. ran away from her placement three times and twice stayed with father, who failed to inform the department of her whereabouts.

In October 2008, the department received a referral alleging general neglect of the children by Mr. and Mrs. S., their foster parents, who had been appointed their legal guardians in June 2006. The referral also alleged that the adult son of the guardians, C.S., had sexually abused M.A., and that M.A.'s older sister Jal.A. had told M.A. that C.S. had also sexually abused J.A. and R.A.

The department investigated the allegations. M.A. first reported that she had been touched by C.S. since she was 10 or 11 years old and had not reported it to anyone, and that he had been touching her for awhile. She then stated that she had reported the abuse to several people—Mrs. S.; a social worker; her school counselor; and the “sheriffs at school”—and that Mrs. S. had told her to keep it a secret. She did not say what, if anything, the others did. When the social worker explained to M.A. how serious the charges were, M.A. changed her story by stating that C.S. had only *tried* to touch her. M.A. never saw C.S. molest her brothers, who denied being sexually abused and who wished to remain in the S.'s home. M.A. also claimed that the S. family practiced the religion of Santeria and sacrificed chickens for a cleansing ritual, though she denied ever seeing a chicken being sacrificed or that the family used spells. The department placed M.A. in a foster home. In a subsequent interview, M.A. stated that C.S. first touched her when she was 10 years old and that he did not do so again after she told Mrs. S. C.S. denied molesting M.A.

On October 7, 2008, the department filed a section 388 petition seeking to have the S.'s legal guardianship of M.A. terminated. The petition alleged that C.S. had sexually abused M.A., that Mr. and Mrs. S. wanted the legal guardianship terminated, and that M.A. was refusing to return to their home. The department also filed a section 387 petition to remove M.A. from the S.'s custody.

On October 8, 2008, father filed a section 388 petition seeking to have J.A. and R.A. removed from the S.'s custody and the S.'s legal guardianship of all the children terminated. Father also requested that the court take off calendar a previously scheduled section 366.26 hearing as to the S.'s adoption of the children, and for the children “not to

practice Santeria and it not to be practiced in the home.” The petition alleged that the department was aware of allegations that M.A. had been sexually abused by the guardians’ son and that J.A. and R.A. had also been abused, that the guardians forced the children to practice Santeria and threatened them with witchcraft. The juvenile court set the petition for a hearing on November 5, 2008.

That same day, father filed a second section 388 petition seeking immediate return of the children to his custody, dismissal of the section 300 petition, and termination of the juvenile court’s jurisdiction with a family law order giving father sole legal and physical custody of the children. The petition alleged that the order to be changed was the sustaining of a “D” allegation as to father, and that “[t]he alleged victims have indicated they made the allegation up.” Father attached his declaration in which he stated that his “daughters have all indicated that they made up the sexual abuse allegations and these allegations are false.” The juvenile court set the second petition for hearing, and eventually continued the hearings on the department’s section 387 and 388 petitions and father’s section 388 petitions to January 15, 2009.

In the meantime, the department reported that its investigation had found insufficient evidence that M.A. had been sexually abused by C.S. The department also reported that J.A. and R.A. refused to have any contact with father and M.A. The department recommended that its section 387 petition be dismissed, its section 388 petition regarding termination of M.A.’s guardianship be granted, that M.A. remain in foster care, that the S.’s legal guardianship over her be terminated, and that J.A. and R.A. remain in the care of the S.’s. The department, the S.’s, and the children’s attorneys signed a mediation agreement to such effect, and the court adopted the agreement. Because there was no agreement with respect to father’s section 388 petitions, the court ultimately set a contested hearing on these petitions for April 14, 2009, and ordered M.A. to be present per father’s request. Prior to this hearing, the court granted the department’s request to take the previously scheduled section 366.26 hearing off calendar because the S.’s indicated they no longer wanted to pursue adoption of J.A. and R.A.

In response to father's section 388 petitions, the department reported that its investigation found that M.A.'s allegations that C.S. had sexually molested her and her brothers was unfounded. M.A. denied having any personal knowledge of C.S. sexually abusing her brothers, and acknowledged that the information came from her sister Jal.A., who claimed to have witnessed the abuse. The S. family denied practicing Santeria and explained that on one occasion they had purchased a live chicken from a farm and butchered it to make chicken soup. The social worker opined that it "would be emotionally devastating to [J.A.] and [R.A.] should they be removed from the S.'s care." With respect to the allegations of sexual abuse by father, the department reported in December 2008 that none of the children had recanted their claims that father had sexually abused them. The department submitted a letter from M.A.'s therapist dated January 16, 2009 stating that M.A. "has apparently been convinced to recant her earlier testimony regarding the sexual abuse she allegedly endured at the hands of her father," and that she "as well as her older sisters (and possibly her parents), are capable of saying anything they want in order to suit their needs or desires at a particular time." In October 2008, the children's mother stated that father had been "bugging [Jal.A.] to write a letter," and that in 1998, after a visit with father, M.A. told her mother that father had hit her and touched her. The mother was not sure who to believe anymore, she did not think it was a good idea for the children to be with father, and she knew that the boys were afraid of him.

At the hearing on April 14, 2009, with respect to father's first section 388 petition, the juvenile court stated that the section 366.26 hearing had already been taken off calendar and that the balance of the petition was denied. Father's attorney objected to the denial without a full hearing, and the court overruled the objection. The court then denied father's second section 388 petition without a hearing on the ground that section 388 was not an appropriate vehicle for the allegations raised in the second petition, namely, that the section 300 petition, which was sustained nearly a decade earlier, was based on false testimony, and that such an issue should be addressed by

appeal. Father's attorney objected, and asked the court to mark as exhibits for both petitions a transcript of a hearing dated September 20, 2006 and two letters from Jal.A. Father's attorney also objected to M.A.'s absence, and stated that "father would call the mother, who's present, but has submitted a letter under penalty of perjury." M.A.'s attorney responded that M.A. was in school undergoing statewide testing that day, and that it would not be in her best interest to testify. The court did not mark the documents, stating that even if it were to consider the merits of the second section 388 petition, it would find that granting the petition was not in the children's best interests. This appeal followed.

DISCUSSION

Section 388 and Due Process

Pursuant to section 388, a parent may petition the court to change, modify or set aside a previous court order. The parent has the burden of showing, by a preponderance of the evidence, there is a change of circumstances or new evidence and the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) "This is a difficult burden to meet in many cases, and particularly so when, as here, reunification services have been terminated or never ordered." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

"The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*In re Stephanie M.*, *supra*, at pp. 318–319.) "The denial of a section 388 motion rarely merits reversal as an abuse of discretion." (*In re Amber M.*, *supra*, 103 Cal.App.4th at pp. 685–686; *In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

While a parent may have a due process right to call a witness, “[p]rocedural due process is not absolute.” (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 850.) “[D]ue process is not synonymous with full-fledged cross-examination rights. [Citation.] Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.] Even where cross-examination is involved, the trial court may properly request an offer of proof if an entire line of cross-examination appears to the court to be irrelevant to the issue before the court. [Citations.]” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

California’s Constitution provides that “[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const. art. VI, § 13; Evid. Code, § 354 [same]; Code Civ. Proc. [no presumption of error; requiring probability of a different result absent the error].) In *In re Celine R.* (2003) 31 Cal.4th 45, 60, the Court found that the harmless error test of *People v. Watson* (1956) 46 Cal.2d 818, 836 applied in dependency matters. Thus, reversal is permitted “only if the reviewing court finds it reasonably probable the result would have been more favorable to the appealing party but for the error.” (*In re Celine R.*, *supra*, at p. 60.)

As we discuss below, father has wholly failed to demonstrate that the outcome of his two section 388 petitions would have been different had he been allowed a full evidentiary hearing.

First Section 388 Petition

Father’s first section 388 petition sought to have his sons removed from the S.’s custody and the termination of the S.’s guardianship based on alleged sexual abuse of the boys by the S.’s son, and for the boys “not to practice Santeria and it not to be practiced

in the home.” To the extent father sought to have M.A. testify to the issues in this petition, it was undisputed that she had already been removed from the S.’s custody based on her allegations of sexual abuse by C.S. Even if M.A. had taken the stand and continued to aver that C.S. had sexually abused her, the record already established that she had no personal knowledge of any abuse of her brothers by C.S. Her only information in this regard was hearsay from her sister Jal.A. The record also established that the brothers had denied any sexual abuse by C.S., and had repeatedly made clear that they did not want to see father and M.A. and that they wanted to remain in the S.’s home, where they had lived for a decade. There is nothing in the record to suggest that their testimony would have varied. Nor did father seek to have his sons or Jal.A. testify. Although father sought to have two letters written by Jal.A. marked as exhibits, he never made any offer of proof as to the contents of the letters, nor are they part of the record. Father also sought to have marked as an exhibit a transcript of a hearing that he claims took place on September 20, 2006. But the record contains no evidence of a hearing in this case taking place on that date.

With respect to father’s request that the juvenile court order the S.’s to stop practicing Santeria and to stop them from forcing the boys to do so, father presents no arguments in this regard on appeal. He does not point to any potential testimony that may have resulted in the court’s granting of his request. Indeed, M.A. had already informed the social worker that she had never seen the S.’s sacrifice any animals or use any spells. Even if the S.’s practiced Santeria, which they denied, father does not explain under what authority the juvenile court could order them to stop practicing any particular religion. (See *Church of Lukumi Babalu Aye v. City of Hialeah* (1992) 508 U.S. 520, 531–547 [finding city ordinances aimed at stopping the practice of Santeria and its rituals of animal sacrifice invalid].) Because father has not presented any arguments on this issue, we deem it as having been forfeited. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

In short, there is simply no reasonable possibility that father's first section 388 petition would have been granted even following a full evidentiary hearing, because removing the boys from the only parents they had known for ten years based on unsubstantiated claims by M.A. would not promote the boys' best interests.

Second Section 388 Petition

Father's second section 388 petition identified as the order to be modified a sustained "D" allegation against him. Presumably this means the count in the section 300 petition sustained under subdivision (d) with respect to father's alleged sexual abuse of his children. The petition alleged that the victims had made up the allegations of sexual abuse by father, and father's supporting declaration stated that his "daughters have all indicated that they made up the sexual abuse allegations." The petition seeks the immediate return of the children to his custody, dismissal of the section 300 petition and the termination of the juvenile court's jurisdiction.

At the hearing on the petition, father sought to have M.A. and the children's mother testify, and to have marked as exhibits Jal.A.'s two unidentified letters and a transcript of the unidentified hearing, and referred to a letter purportedly signed by mother under penalty of perjury. Once again, father never made any offer of proof as to the documentary evidence, including mother's letter, which is also not part of the record. Nor did he make any offer of proof as to the mother's testimony. The mother had already told the social worker that she did not know who to believe and that she did not think it was a good idea for the children to be with father.

Even if M.A. had taken the stand and recanted her earlier claim that father had sexually abused her, her testimony would have no bearing on whether father's other children had recanted their claims of sexual abuse by father. Moreover, even if the court were to strike the counts against father under section 300, subdivision (d), the remaining counts in the section 300 petition still alleged sexual abuse by father under counts (c) and (i), and the petition still alleged that father had physically abused the children,

engaged in domestic violence, had a criminal history and a history of substance abuse. M.A.'s testimony would not have addressed any of those other counts. Thus, any testimony by M.A. that she had lied about father's sexual abuse would not require the juvenile court to vacate the entire section 300 petition, and the remaining counts would support juvenile court jurisdiction. (*In re Dirk S.* (1993) 14 Cal.App.4th 1037, 1045 [a single count is sufficient to uphold jurisdiction].)

Once again, there is no possibility that admission of the excluded evidence, even if favorable to father, would have resulted in the juvenile court vacating the section 300 petition and returning the children to father's custody.

DISPOSITION

The orders denying father's October 8 and November 5, 2008 section 388 petitions are affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST